

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In re REFCO INC. SECURITIES LITIGATION

07 MDL No. 1902 (JSR)

KENNETH M. KRYS, *et al.*,

Plaintiffs,

-against-

CHRISTOPHER SUGRUE, *et al.*,

Defendants.

ECF CASE

08-cv-3065 (JSR)

08-cv-3086 (JSR)

KENNETH M. KRYS, *et al.*,

Plaintiffs,

-against-

ROBERT AARON, *et al.*,

Defendants.

08 Civ. 7416 (JSR)

KENNETH M. KRYS, *et al.*,

Plaintiffs,

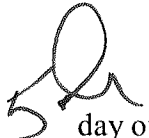
-against-

DEUTSCHE BANK SECURITIES INC., *et al.*

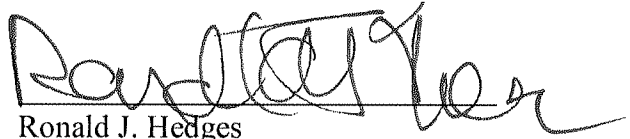
10-cv-3594 (JSR)

ORDER ON SUPP./REBUTTAL REPORTS

This matter having been opened to the Court by application of Plaintiffs' counsel for leave to serve supplemental/rebuttal expert reports; and the Court having considered responses served on behalf of the Bank Defendants, Deutsche Bank Securities Inc., PricewaterhouseCoopers LLP, the Grant Thornton Defendants, and the Mayer Brown Defendants, and the Court having conducted telephone conferences with counsel on Wednesday, August 29, 2012, and Friday, August 31, 2012; and the Court having considered all of the submissions served on behalf of the parties in connection with this Application; and good cause appearing;

 IT IS on this 5 day of September 2012, **ORDERED** as follows:

1. Plaintiffs' application for leave to serve any supplemental/rebuttal expert reports be and it hereby is denied without prejudice for the reasons set forth in the transcript of the hearing of August 31, 2012, a copy of which is attached.
- 2) After the conclusion of all expert discovery, presently scheduled to end on September 30, 2012, Plaintiffs may renew their request by filing an application, which shall include but not be limited to, copies of all existing reports and the deposition transcripts of these experts together with detailed reasons supporting the application for leave to serve any additional reports at that time.


Ronald J. Hedges
Special Master

SO ORDERED

~~Dated: September~~ 5, 2012

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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4 In re REFCO, INC. SECURITIES
5 LITIGATION

07-MDL-1902
(Applies to all cases)

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10 TELEPHONIC HEARING on Friday,
11 August 31, 2012, commencing at 12:07 p.m., before
12 Jamie I. Moskowitz, a Registered Professional
13 Reporter and Notary Public.

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SPECIAL MASTER HEDGES: Good
afternoon. How is everyone?

A SPEAKER: Good afternoon, Special
Master.

SPECIAL MASTER HEDGES: I will take
that to mean that everyone is fine and we're
ready to go. Right?

A SPEAKER: That's right.

SPECIAL MASTER HEDGES: So my
question, frankly, is this, and let's back up a
little because I just want to make sure we have
some basic information on the record.

How many -- I'm going to call them
supplemental, because I don't know if rebuttal
is the correct word here, reports may we see
from the plaintiffs all together?

MR. MILLS: We were anticipating, I
believe, four. This is Bob Mills, by the way.

SPECIAL MASTER HEDGES: Mr. Mills,
tell me the subject matter of the four experts.

MR. MILLS: well, one would be
addressing -- one or two would be addressing, I
believe, matters that were raised by Mayer
Brown's experts. Mayer Brown, by itself,
disclosed, I believe, five experts in addition

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to joining in with certain other experts of
the -- co-sponsored by certain other experts.

And there were some issues in those
reports that I think have been explained in the
e-mail we sent to you, that we believe in
fairness we ought to be able to have an
opportunity to address.

The other issues to be addressed for
our experts are those, I think, that we have
laid out in the bullet points in the e-mail
addressing, for example, you know, SPHINX's
supposed knowledge of the lack of segregation
of excess cash at RCM and authorization of the
transfers; that's something that we certainly

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did not bring up in our expert reports that the defendants did.

SPECIAL MASTER HEDGES: By the way, let me interrupt you and just for the record ask you whether the bullet points you are referring to are in the Andelin to me e-mail of August 30, 2012 at 1:30 a.m., correct?

A SPEAKER: Yes, yes.

SPECIAL MASTER HEDGES: Okay, you can proceed.

MR. MILLS: Okay. And I think that a

very specific example of why it would be fair to allow us to submit expert reports is in response to -- specifically to a couple of Mayer Brown's experts who, attempt to articulate very specific supposedly legitimate business purposes or round-trip loan transactions.

We have taken the position throughout this case that the round-trip loan transactions were illegitimate on their face and fraudulent on their face.

We have had up until now nothing but only very vague reference from certain defendants about certain legitimate business -- about there being legitimate business purposes for round-trip loan transactions, but we have never heard it articulated in any type of specifics.

Now, in response to our expert reports, the defendants have submitted a couple of expert reports that lay out very specifically types of transactions that they claim are legitimate and that would have given Mayer Brown no reason to believe that there was anything wrong with these round-trip loan

transactions.

I believe that in fairness to the plaintiffs, we ought to be given an opportunity to have an expert evaluate those very detailed purposes set out in those reports in order to determine and opine, number one, whether those purposes are, in fact, legitimate; and number two, whether those purposes are, in fact, anything like the round-trip loans that were, in fact, occurring at REFCO in this case.

I think that's a real specific example of why, in fairness, we ought to be able to submit a rebuttal report to those.

SPECIAL MASTER HEDGES: Before we even go into the other ones, and they are in the bullets as you mentioned.

MR. MILLS: Yes, Your Honor.

SPECIAL MASTER HEDGES: If I allow you to do this, where does it end? Because I know what's going to happen. As soon as you're done, I'm going to hear from an adversary saying, Judge, this isn't fair, now he's addressing these things and I should be able to respond to them.

MR. MILLS: It is not our intention to

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1 raise anything new in these reports, Your
2 Honor. It's solely to rebut issues that were
3 raised in the defendants' expert reports.

4 SPECIAL MASTER HEDGES: Who wants to
5 speak for the defendants first?

6 MR. SINGER: I will, Your Honor, this
7 is Craig Singer from Mayer Brown. And let me
8 start by making two points. The first is, is
9 the one thing I haven't heard about is how in
10 the world this can possibly be done. Whether
11 there are four supplemental reports, whether
12 are there are six supplemental reports, six
13 bullet points that the plaintiffs put in in
14 their e-mail, or whether there are eight
15 supplemental reports that you -- if you add to
16 those six bullet points the two reports that
17 they pointed to from Mayer Brown's experts,
18 it's just not possible, we have a
19 September 30th deadline.

20 Judge Rakoff has said he is not going
21 to move that deadline. If you don't move the
22 deadline, there are not enough days left in the
23 calendar to get this done. So it's simply
24 impossible. Because all of these experts, both
25 plaintiffs' experts, defendants' experts would

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1 have to be deposed after the supplemental
2 reports; and after everybody had a chance to
3 digest what was in there and after the
4 defendants had an opportunity to seek any
5 surrebuttal reports, if necessary, because by
6 definition if the plaintiffs are going to be
7 putting in opinions on issues in which they
8 have the burden of proof that they have not yet
9 put in, the defendants would have an
10 opportunity and a right to respond because it's
11 our party defending the case.

12 SPECIAL MASTER HEDGES: Counsel, hold
13 on one second. His position is, and I could be
14 corrected after I hear you out, is that we
15 served our expert reports, we raised issues via
16 our experts, and having done that, the
17 plaintiff says, look, all I'm doing is
18 responding to new arguments they were raised.

19 There's nothing new coming in in these
20 reports that counsel wants me to allow, so, in
21 effect, all I'm doing is leveling the playing
22 field. Everyone gets to say something once
23 about a position. Everyone gets to respond to
24 it once, and then that's it; isn't that right?

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1 MR. SINGER: That's correct, Your
2 Honor. It's right if that's what they're
3 saying. This is Craig Singer speaking again.
4 But it's not right that that is true.

5 Couple things. They have the burden
6 of proof. Everything in Mayer Brown's expert
7 report, including especially the stuff about
8 the so called round-trip loans, is in
9 plaintiffs' complaint. They have alleged, they
10 have based their case on the back-to-back

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loans. They put in an expert report from Richard Breeden saying that Mayer Brown knew about the fraud at REFCO because they worked on the back-to-back loans and the back-to-back loans are inherently suspicious.

They knew our defense. Whether they knew or not is irrelevant, but they did know that our defense to that proposition is that back-to-back loans are not entirely suspicious. We have said that in our motion papers, the Special Master Capra has said that in his reports and recommendations. There are cases that we have cited to support that proposition. It is all a response to their complaint as to which they had the burden of proof, and if they

wished to put in expert testimony about back-to-back loans over and above what they have already offered, which they have offered in spades, if they wish to put in additional expert testimony on that, they had every opportunity to do that by the deadline for their reports as to which they had the burden of proof.

But there is nothing new therefore about our response. We put in the expert testimony that we believe supports our defense. That's what we have a right to do. We are not unfairly raising new issues. We do not have the burden of proof on the case.

Judge Rakoff's standard order in the case, in all of his cases, specifically deals with this situation. It says that he requires all expert testimony by the party bearing the burden of proof by a particular date certain, which is what happened here. The opponent gets to put in his expert testimony by a date certain, which is what happened here, and no -- I'm quoting now, "No expert testimony, whether designated as rebuttal or otherwise, will be permitted by other experts or beyond the scope

of the opinions covered by the aforesaid disclosures, except upon prior express permission of the Court, application for which must be made no later than 10 days..." et cetera.

So, he's clearly discouraging it, it's clearly the exception, it's very unusual. They had the burden of proof.

And back to the first point, there's just no time to do it. Even if there were any right to putting in a rebuttal report, it can't happen here because it can't be done within the constraints of the discovery schedule, which the plaintiffs have known about all along; and notwithstanding that, the plaintiffs asked for an additional two weeks to put in their opening expert reports, their only expert reports, knowing that that would leave only six weeks for expert discovery after the defense put in their expert report.

SPECIAL MASTER HEDGES: Let me tell

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you what my problem is. I understand everything that's being said by all parties. I don't have the actual expert reports in front of me, and although I have an understanding

based on the bullet points in this one e-mail that came in that there was discussion on before, I don't know what the reports say. My inclination is to allow these reports solely for the purpose of me having an opportunity to rule on them with the understanding that no one will be obliged to get any kind of rebuttal report into those; and also with the understanding, quite frankly, that my inclination is not to allow these reports for the simple reason that you mentioned, Counsel, that we have got a date deadline and I don't deem myself competent to change the deadline that Judge Rakoff gave.

That procedure is something that would be acceptable to everyone at least now, that I allow them to be served, I have an opportunity to look at them and I strike or disallow whatever I think I should disallow in there.

MR. SINGER: This is Craig Singer. I would object to that procedure for the simple reason that there's no time to do it. We have to schedule depositions of the expert immediately. We have already scheduled many of them but those would have to be rescheduled and

everything pushed back. We have until September 30th to take all of the expert depositions.

There's a period of time when they have to draft and put in their rebuttal reports even provisionally so that you can look at them and then accept or reject them. There won't be time to get the depositions done. So I would object for that reason. I would also object --

SPECIAL MASTER HEDGES: Hold on for one second, then I will let you come back and put your other objection on the record.

Let's assume that we -- the schedule as it is now, everything is completed by September 30th, I don't allow these rebuttal reports, or whatever you want to call them, to come in at this point.

What do I do? Limit the plaintiff on cross-examination of your witnesses; or allow everything to be examined in the reports and use that as a basis to decide whether I should be going to Judge Rakoff and asking for the parties to have more time to deal with this other round of experts' preps?

MR. SINGER: Craig Singer, again.

There is no -- the depositions are going to happen. It has to be on the basis of all of the opinions that have come in in the case, and so there's no reason to limit experts' depositions on the basis of potential rebuttal reports.

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I mean, if there aren't going to be rebuttal reports, the expert depositions can go forward and the experts can be deposed on every issue in their reports. We know what they all are.

If there are going to be rebuttal reports, then they can't be deposed until those rebuttal reports are submitted and we know what's going to be in them, and we know whether they are going to be in to evidence or not. So that's the logistical impossibility here, it just can't be done.

My other objection, just for the record, is there is absolutely no basis for rebuttal reports. They have cited no authority for it, it is not permissible and so I would object to any procedure that would move that process forward in any way.

SPECIAL MASTER HEDGES: Mr. Pendleton,

do you have any position on this?

MR. PENDLETON: My only position is the extent to which the -- the defendants' reports are in the Crips versus Segrue matter. You will recall that we had a separate matter that will go back to the District of New Jersey and be tried there, and my concern is that there should not be any expert rebuttal report in that action as a result of the defense expert reports in the Segrue case, which are not admissible and not expert opinions in our case. So that's my only concern.

SPECIAL MASTER HEDGES: Anyone else have any other comment?

MR. SINGER: Judge, I think what Mr. Pendleton said just reinforces the impossibility of the situation. We now are going to have rebuttal reports in this case, then there will be a lot of back and forth as to whether there are rebuttal reports in the other SPHINX case, and we don't know what the procedure is going to be in terms of coordination or consolidation and so on. So it just adds yet another level of complexity.

And just to say one more time, there

is no unfairness here to plaintiffs from anything that has been put in by the defendants. Everything comes straight out of their complaint. It comes straight out of the deposition testimony. Mr. Collins testified about back-to-back loans. They were put on notice of that for years; they knew this was coming.

In terms of the issue that Mr. Mills raised about SPHINX's knowledge, or the lack of segregation and the authorization of the transfers, these have been intensively explored in discovery this year. They knew this was coming.

So it's outrageous to say now they were somehow surprised by these opinions coming in from the defendants. The case has proceeded

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18 exactly the way it was supposed to: Expert
19 reports by the party having the burden of
20 proof, plaintiffs on these cases, and then the
21 defense expert reports, and that's it. And now
22 we need to finish up discovery by the deadline
23 that we have and we need to move this case
24 forward.

25 MR. MILLS: This is Bob Mills, again,

0019 1 and I don't have it in front of me, but I am
2 pretty sure that we did not plead in our
3 complaint that there were legitimate business
4 purposes for the round-trip loans. This is, as
5 Mr. Singer indicated, this is a defense that
6 was raised by the defendants, and they never
7 really -- they have never articulated in any
8 detail until we got these expert reports.

9 And I believe it really is fair to
10 allow us to have an opportunity to evaluate
11 what their experts said and comment on that.

12 MR. SINGER: Your Honor, Craig Singer,
13 again. Just to respond to that, it's entirely
14 incorrect. We have made detailed arguments in
15 our motion papers about the legitimacy of
16 back-to-back loans years ago, which are cited
17 in the e-mail that I sent to Your Honor on
18 behalf of the defendants this morning.

19 And the complaint, of course, does not
20 read that the back-to-back loans were
21 legitimate or else we wouldn't have a case.
22 The back-to-back loans were illegitimate.

23 Our defense is that there are
24 legitimate purposes for back-to-back loans.
25 That is what we said in our motion papers, that

0020 1 is what Mr. Collins testified to. And that is
2 what experts are supposed to do, is to amplify
3 that defense with -- that's what's contemplated
4 all along, that's what every expert witness in
5 this case has done. So I just don't see the
6 issue.

7 SPECIAL MASTER HEDGES: Here is where
8 we will go from now, and this is a tentative
9 ruling. As of this date and based on the
10 submissions I have seen by e-mail as well as
11 argument today, I am not going to allow
12 rebuttal or reply reports, however these are
13 denominated or identified.

14 That being said, you will complete the
15 disclosure and service of all the expert
16 reports that have been contemplated. For this
17 application arose for leave to serve another
18 round of reports, you will take the
19 depositions, complete the depositions by
20 September 30th, and after I have had an
21 opportunity to see all the expert reports that
22 are due as of now, as well as the deposition
23 transcripts, and at the depositions obviously
24 plaintiffs may inquire into what they allege to
25 be new theories or whatever offered by defense

0021 1 experts, you may come back to me on a renewed
2 application for a leave to serve these rebuttal

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3 reports.

4 Mr. Pendleton, you can prepare a form
5 of order for me, please.

6 MR. PENDLETON: I will do that and
7 send it out this afternoon, Your Honor.

8 SPECIAL MASTER HEDGES: Please. And
9 make sure this reflects that this is a ruling
10 without prejudice to a further application
11 after completion of the current, or whatever
12 language you want to use in the order, expert
13 process. Anything else, Counsel?

14 A SPEAKER: Nothing further.

15 SPECIAL MASTER HEDGES: All right,
16 thank you. Get me a form of order.

17 I'd like to have the transcript,
18 please. Mr. Pendleton, will you make
19 arrangements to have the transcript attached to
20 the order?

21 MR. PENDLETON: Yes.

22 SPECIAL MASTER HEDGES: And let's just
23 put in the order that for the reasons described
24 in the attached, all right?

25 MR. PENDLETON: Okay.

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1 SPECIAL MASTER HEDGES: Okay, Counsel,
2 thank you. Keep yourself busy with the expert
3 reports as you have them now. Send the expert
4 depositions as you have these now. You don't
5 have a trial date, correct?

6 MR. MILLS: No, that's right.

7 SPECIAL MASTER HEDGES: I assume,
8 Counsel, we will have plenty of time, probably
9 two weeks to revisit this and you get more
10 reports in if you need to.

11 And by the way, where is -- who am I
12 missing today? Who sent an e-mail to me
13 yesterday? I sent a response, too, but I don't
14 recall what it was. Well, never mind, it
15 doesn't matter.

16 Get me the order, Mr. Pendleton,
17 circulate it to consent as to form only,
18 please.

19 MR. PENDLETON: Yes, will do.

20 SPECIAL MASTER HEDGES: And we will go
21 from there. All right, thank you, everyone.
22 Have a good Labor Day.

23 MR. SINGER: Thank you.

24 MR. PENDLETON: Thank you.

25 MR. MILLS: Thank you.

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1 (Whereupon, the hearing concluded at
2 12:29 p.m.)
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